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Jeffrey M. Laurence

COMMENT

Minnesota Burning: *R.A.V. v. City of St. Paul* and First Amendment Precedent

By JEFFREY M. LAURENCE*

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* J.D. Candidate, Hastings College of the Law; B.S. 1991, University of California, Berkeley. The author would like to thank the *Hastings Constitutional Law Quarterly* Editorial Board for all of their assistance and support.

Introduction

In June of 1990, Robert A. Viktora,[1] a minor, burned a crudely assembled cross on the front yard of an African-American family's home in St. Paul, Minnesota.[2] The prosecutor charged Viktora under Saint Paul's Bias-Motivated Crime Ordinance,[3] which provides:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.[4]

The Minnesota Supreme Court rejected Viktora's First Amendment challenge and upheld the constitutionality of the ordinance.[5] Viktora petitioned the United States Supreme Court, which granted certiorari.[6] The question presented to the Court in *R.A.V. v. City of St. Paul*[7] was whether the ordinance was overbroad in restricting activity protected by the First Amendment, and thus unconstitutional, or whether the ordinance was properly limited to acts that fall outside of First Amendment protection.[8] The majority held that the ordinance, as construed by the Minnesota Supreme Court, prohibited only "fighting words" and thus was not unconstitutional for overbreadth reasons.[9]

The majority, however, went on to consider whether the ordinance placed an unjustified, content-based restriction on expression that does not normally merit First Amendment protection. The Court concluded that it did,[10] extending the strict scrutiny standard usually

1. David Schimmel, *Are "Hate Speech" Codes Unconstitutional? An Analysis of* R.A.V. v. St. Paul, 76 W. EDUC. L. REP. 653, 654 (1992).
2. R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2541 (1992).
3. *Id.*
4. ST. PAUL, MINN., CODE § 292.02 (1990).
5. *R.A.V.*, 112 S. Ct. at 2541; *In re* Welfare of R.A.V., 464 N.W.2d 507, 510-11 (Minn. 1991).
6. *R.A.V.*, 112 S. Ct. at 2542.
7. 112 S. Ct. 2538 (1992).
8. *See* Brief for Petitioner at 2, R.A.V. v. St. Paul, 112 S. Ct. 2538 (1992) (No. 90-7675) (questions presented); Brief for Respondent at 2, R.A.V. v. St. Paul, 112 S. Ct. 2538 (1992) (No. 90-7675) (questions presented).
9. *R.A.V.*, 112 S. Ct. at 2542.
10. *Id.* at 2547-50.

reserved for content-based restrictions on fully protected speech to fighting words. With this holding, the Court created an *underinclusiveness* test for restrictions on a class of speech, fighting words, it had once considered unprotected.[11] After *R.A.V.*, any regulation of fighting words that only covers a limited, underinclusive, class of fighting words is subject to strict scrutiny, whereas regulations covering all fighting words are not. In enunciating this new doctrine for restrictions of fighting words, the Court ventured into uncharted First Amendment territory with little precedential support and without the aid of briefing by the parties or by most of the Amici Curiae.[12] Consequently, this significant departure from traditional First Amendment theory is based on flawed reasoning and hollow rhetoric, which could have potentially far-reaching effects on other areas of free speech doctrine.

The first part of this Comment critically examines the decision in *R.A.V. v. City of St. Paul*[13] by assessing both the validity of the majority's new underinclusiveness test for restrictions on fighting words, and the test's potential impact on First Amendment jurisprudence. Part II of this Comment examines the case precedent relied on by the majority and demonstrates how the majority misapplied that precedent in reaching its decision. Part III challenges the analysis the majority used to support its conclusions. Part IV questions the exceptions the majority carved out of its new doctrine and highlights their weaknesses. Part V assesses the potential impact *R.A.V.* could have on other areas with First Amendment implications, such as commercial speech and workplace harassment.

I. The *R.A.V.* Opinions

Although the Justices unanimously found the St. Paul ordinance unconstitutional, they differed sharply over the rationale for that holding. Justice Scalia, joined by Chief Justice Rehnquist and Justices Kennedy, Souter, and Thomas, wrote the opinion of the Court. Justices White, Stevens, and Blackmun wrote separate concurring opinions with Justice O'Connor joining Justice White.

A. The Majority Opinion

At the outset, the majority opinion, written by Justice Scalia, held that the Court was bound by the Minnesota Supreme Court's con-

11. *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).
12. *See infra* note 8.
13. 112 S. Ct. 2538 (1992).

struction of the St. Paul ordinance limiting its reach to fighting words.[14] Thus, it found that the ordinance was not unconstitutionally overbroad.[15] Justice Scalia next pointed out that, although the First Amendment generally prevents the government from banning speech or expression based on its content, some classes of speech, such as obscenity, defamation, or fighting words, are of "such slight social value" that the state's interest in order and morality justifies limiting them.[16] Justice Scalia departed from the literal language of earlier cases on proscribable speech,[17] however, and argued that, although such areas of speech may be limited, they are not entirely unprotected under the First Amendment.[18] Thus, the majority concluded, while the government may limit a class of proscribable speech as a whole, it may not proscribe a subset of that class based on the content of that subset.[19]

The majority opinion went on to identify three exceptions to the newly articulated rule. First, Justice Scalia wrote that the government could validly limit a subclass of speech when the "basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable."[20] Because the government can restrict obscenity as a class, it can also restrict the subset of only the most prurient obscenity, because it is the prurience of obscenity that makes obscenity proscribable.

In the second exception, the Court held that content-based restrictions on expression are valid if that expression is associated with detrimental "secondary effects."[21] "Secondary effects" are harms that are found alongside, or arise indirectly from, certain classes of other-

14. *Id.* at 2542. *See also In re* Welfare of R.A.V., 464 N.W.2d 507, 510-11 (Minn. 1991).

15. *R.A.V.*, 112 S. Ct. at 2542.

16. *Id.* at 2542-43.

17. *See, e.g.*, Bose Corp. v. Consumers Union, Inc., 466 U.S. 485, 504 (1984) (noting that the protection of the First Amendment does not extend to the proscribable classes of speech); Roth v. United States, 354 U.S. 475, 483 (1957) (stating that these categories of expression are "not within the area of constitutionally protected speech").

18. *R.A.V.*, 112 S. Ct. at 2543.

19. *Id.* at 2543-45.

20. *Id.* at 2545.

21. *See, e.g.*, Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456, 2469-71 (1991) (Souter, J., concurring) (finding a law requiring nude dancers to wear G-strings constitutional because the state's interest in reducing the secondary effects of such dancing, and the means used by the state, satisfied the *O'Brien* test); Renton v. Playtime Theatres, Inc., 475 U.S. 41, 52-56 (1986) (upholding as constitutional a zoning regulation requiring that adult theaters be located a specified distance from a dwelling, church, park, or school because of the harmful secondary effects associated with such theaters).

wise protected speech. One example is increased prostitution around adult movie theaters.[22] Such effects may justify incidental restrictions on the class of speech with which they are associated.[23] According to Justice Scalia, "Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy."[24] This exception merely extended the "secondary effects" doctrine into the area of proscribable speech.

Finally, the Court alluded to a third "catch-all" exception. Justice Scalia wrote that a wholly arbitrary restriction on a subclass of proscribable speech may be valid so long as the restriction was not aimed at suppressing ideas or content.[25] Thus, under the Court's newly articulated doctrine, the government could permissibly prohibit, for example, obscene movies that feature blue-eyed actresses.[26]

Applying its new construction of the fighting words doctrine to the St. Paul ordinance, the majority found the ordinance invalid. According to the majority, the ordinance placed an impermissible content-based restriction on a subclass of fighting words because it restricted only racial, religious, or gender-based fighting words.[27] The Court held that the ordinance did not fall within any of its three exceptions.[28] The Court concluded that because St. Paul could have accomplished its objective with a general ordinance aimed at all fighting words instead of one limited to "the favored topics," the ordinance was unconstitutional.[29]

B. The Concurring Opinions

Justices White, Stevens, and Blackmun authored separate concurring opinions that uniformly condemned the majority approach to both the *R.A.V.* ordinance and the fighting words doctrine.[30]

22. *See* Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986); *see also Barnes*, 111 S. Ct. at 2469 (Souter, J., concurring).

23. *See* United States v. O'Brien, 391 U.S. 367 (1968).

24. *R.A.V.*, 112 S. Ct. at 2546-47.

25. *Id.* at 2547.

26. *Id.*

27. *Id.* Justice Scalia further noted that the ordinance went beyond simple content-based discrimination to viewpoint-based discrimination, which he suggested is an even more unfair limitation on the use of fighting words. *Id.* at 2547-48.

28. *Id.* at 2548-49.

29. *Id.* at 2550.

30. *Id.* at 2550, 2560-61. Justices O'Connor and Blackmun joined Justice White's opinion in full, and Justice Stevens joined much of its condemnation of the majority approach. *Id.* at 2550. Justices White and Blackmun also joined the portion of Justice Stevens' opinion rejecting the majority's newly articulated doctrine. *Id.* at 2561.

Although all agreed that the St. Paul ordinance was unconstitutional, they did not find it fatally underinclusive. Instead, they agreed that it was unconstitutionally overbroad because it criminalized expressive conduct beyond mere fighting words and included protected expression that happened to cause hurt feelings or resentment.[31] In so finding, the concurring Justices agreed that the Minnesota Supreme Court's construction of the ordinance limiting it to fighting words was still too generalized to restrict its impact purely to proscribable speech.[32]

The concurring Justices also unanimously repudiated the majority approach. They denounced the majority's creation of an underinclusiveness doctrine for unprotected speech[33] as disregarding longstanding precedent and defying logic,[34] and they rejected it as unworkable.[35]

II. First Amendment Precedent and the Majority's New Doctrine

The majority cited numerous First Amendment cases in its examination of the statute at issue in *R.A.V.* Although it purported to rely upon established precedent, the majority did not properly apply it in creating its new doctrine. In addition, the majority did not examine all of the relevant cases.

A. The Majority's Misapplication of Key First Amendment Cases

Justice Scalia began the analysis in *R.A.V.* by noting that the "First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the

31. *Id.* at 2560.

32. *Id.* at 2558. Although Justices White and Stevens both found the ordinance overbroad, they disagreed on the proper approach to evaluating restrictions on speech. Justice White employed the traditional approach of separating classes of speech into distinct categories of protected and unprotected speech. *Id.* at 2559. Justice Stevens, on the other hand, rejected a categorical approach, *id.* at 2566, in favor of a multi-faceted balancing test involving several factors, such as the nature and context of the expression and of the contested restrictions. *Id.* at 2567-69. *See generally* Schimmel, *supra* note 1.

33. *R.A.V.*, 112 S. Ct. at 2553.

34. *Id.* at 2552-58 ("This reasoning [from earlier cases] is in direct conflict with the majority's analysis in the present case . . . .").

35. *Id.* at 2558. Justice Blackmun, in his brief concurrence, suggested that the majority was influenced by its desire to affect the debate surrounding "politically correct speech" and cultural diversity instead of remaining true to the Court's mission of focussing on the issues presented in the context of the applicable law. *Id.* at 2560-61.

ideas expressed."[36] Justice Scalia also acknowledged that the Supreme Court has, over the past 200 years,

> permitted restrictions upon the content of speech in a few limited areas, which are "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." We have recognized that "the freedom of speech" referred to by the First Amendment does not include a freedom to disregard these traditional limitations.[37]

Justice Scalia noted that the Court has "sometimes said that these categories of expression are 'not within the area of constitutionally protected speech' . . . ."[38] He backpedaled, however, on the issue of whether only First Amendment protection is afforded to these proscribable classes of speech. Justice Scalia asserted that prior cases "surely do not establish the proposition that the First Amendment imposes no obstacle whatsoever to regulation of particular instances of such proscribable expression, so that the government 'may regulate [them] freely.'"[39] The majority, however, did not provide any cases that directly supported this assertion. In fact, most of the cases it cited actually reached the opposite conclusion.

Like the Minnesota Supreme Court, the majority relied on *Chaplinsky v. New Hampshire*[40] in finding that the St. Paul ordinance was not overbroad.[41] The Court in *Chaplinsky* held that:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be de-

36. *Id.* at 2542 (citing Cantwell v. Connecticut, 310 U.S. 296, 309-11 (1940); Texas v. Johnson, 491 U.S. 397, 406 (1989)).

37. *Id.* at 2542-43 (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).

38. *Id.* (citations omitted).

39. *Id.* (alteration in original).

40. 315 U.S. 568 (1942). Walter Chaplinsky was arrested for saying to the city marshall, "You are a God damned racketeer" and "a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists." *Id.* at 569 (quotations omitted). He was convicted under a New Hampshire law barring the use of offensive, derisive or annoying words directed at others in a public place. *Id.*

41. *R.A.V.*, 112 S. Ct. at 2542; *In re* Welfare of R.A.V., 464 N.W.2d 507, 510 (Minn. 1991).

> rived from them is clearly outweighed by the social interest in order and morality.[42]

In various cases, the Court has reaffirmed that there is no First Amendment protection for these areas of speech. Discussing fighting words in *Cantwell v. Connecticut*,[43] the Court held that "[r]esort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument."[44] Contrary to the majority's assertion in *R.A.V.* that the prior cases did not hold low speech[45] completely unprotected by the First Amendment,[46] most cases held just that.[47]

The majority in *R.A.V.* relied on *New York v. Ferber*[48] to define the limitations on proscribing low speech. The *R.A.V.* majority pointed to a single sentence in *Ferber* as support for its contention that low speech is protected from certain proscriptions under the First Amendment.[49] The *Ferber* Court, upholding a statutory ban on child pornography, stated, "there [is no] question here of censoring a particular literary theme" or portrayal of sexual activity.[50] The *R.A.V.* majority took this to mean that any censoring of a particular theme or subclass of speech regardless of its status as high or low speech would violate the Constitution.[51] It failed to acknowledge, however, that the statute in *Ferber* was aimed at expression that encompassed more than just obscenity and included expression that has traditionally been pro-

42. *Chaplinsky*, 315 U.S. at 571-72 (footnotes omitted).

43. 310 U.S. 296 (1940).

44. *Id.* at 309-10.

45. "Low Speech" is another term for proscribable speech such as obscenity or fighting words.

46. R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2543 (1992).

47. *See, e.g.*, Sable Communications v. F.C.C., 492 U.S. 115, 124 (1989) ("We have repeatedly held that the protection of the First Amendment does not extend to obscene speech."); Bose Corp. v. Consumers Union, Inc., 466 U.S. 485, 504 (1984) ("[T]here are categories of communication and certain special utterances to which the majestic protection of the First Amendment does not extend . . . . Libelous speech has been held to constitute one such category."); Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973) (noting that obscene material is not entitled to First Amendment protection); Roth v. United States, 354 U.S. 476, 486-87 (1957) (reaffirming prior holdings that certain areas of speech are not protected under the First Amendment).

48. 458 U.S. 747 (1982).

49. *R.A.V.*, 112 S. Ct. at 2543.

50. *Ferber*, 458 U.S. at 749-50, 763.

51. *R.A.V.*, 112 S. Ct. at 2543.

tected as high speech.[52] The *Ferber* statute was thus subject to traditional content-based-restriction analysis.

Furthermore, the *Ferber* Court explicitly stated that categories of speech not falling within the sphere of the First Amendment are not entitled to *any* protection. The Court noted that "[i]t is the content of [an] utterance that determines whether it is a protected epithet or an *unprotected* fighting comment,"[53] and that "[t]here are . . . limits on the category of child pornography which, like obscenity, is *unprotected* by the First Amendment."[54]

Ferber also rejected the notion that restrictions on unprotected (or lesser protected) categories of expression can be unconstitutionally underinclusive. The *Ferber* Court explicitly stated, "Today, we hold that child pornography as defined in [the New York statute] is *unprotected speech* subject to content-based regulation. Hence, *it cannot be underinclusive or unconstitutional for a State to do precisely [what New York has done].*"[55]

Thus, the Court in *Ferber* established a distinction between protected speech and "unprotected" speech, with only restrictions on the former giving rise to an inquiry of underinclusiveness.

Justice Scalia also cited Justice O'Connor's concurrence in *Ferber*, as support for his holding in *R.A.V.* He referred to her statement that "New York's statute does not attempt to suppress the communication of particular ideas."[56] Justice Scalia suggested that this statement reflected his doctrine of striking down a content-based restriction on unprotected speech where it serves to suppress particular ideas. Justice O'Connor, however, emphasized in her concurrence that New

52. The *Ferber* Court noted that the statute was directed at materials relating to the *theme* of underage sexual activity, and not specifically aimed at materials *involving* underage participants and it therefore impinged on protected speech. *Ferber*, 458 U.S. at 749-50.

53. *Ferber*, 458 U.S. at 763 (emphasis added) (quotations omitted) (alteration in original).

54. *Id.* at 764 (emphasis added).

55. *Id.* at 765 n.18 (emphasis added) (citations omitted). The *Ferber* Court contrasted the ordinance at issue with one that implicated protected speech and therefore gave rise to an underinclusiveness claim. The *Ferber* Court also noted that the statute banning child pornography:

> sufficiently describes a category of material the production and distribution of which is not entitled to First Amendment protection. It is therefore clear that there is nothing unconstitutionally "underinclusive" about a statute that singles out this category of material for proscription. It also follows that the State is not barred by the First Amendment from prohibiting the distribution of unprotected materials produced outside the State.

Id. at 765-66 (footnotes omitted).

56. *Id.* at 775 (O'Connor, J., concurring).

York's child-pornography statute impinged on high speech as well as unprotected low speech.[57] She applied strict scrutiny because protected speech was directly affected by the regulation, but found that New York had a compelling interest in the regulation of child pornography.[58] Her concern regarding the possible suppression of ideas reflected the potential problems in applying content-based restrictions to a class of speech, child pornography in this case, which is broader than the unprotected category of obscenity. Justice O'Connor was not addressing the issue of content-based restrictions on low speech as the *R.A.V.* majority would have us believe.

Thus, when asserting "[o]ur cases surely do not establish the proposition that the First Amendment imposes no obstacle whatsoever to regulation of particular instances of such proscribable expression, so that the government may regulate [them] freely,"[59] the majority was making more of a plea than a conclusion based on an analysis of the precedent in the field. No case law has mandated that restrictions on expression falling within the proscribable categories cannot be content-based.

B. Cases on Content-Neutral Restrictions Also Fail to Justify the Majority's New Doctrine

In addition to the lack of precedential support from cases involving content-based restrictions, the majority's position also lacks support from cases involving content-neutral restrictions. The majority attempted to draw an analogy between the content-neutral requirement it established in *R.A.V.* and the traditional limitations on content-neutral restrictions for protected high speech.[60] The majority noted,

> The proposition that a particular instance of speech can be proscribable on the basis of one feature (e.g., obscenity) but not on the basis of another (e.g., opposition to the city government) is commonplace, and has found application in many contexts. We have long held, for example, that nonverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses—so that burning a flag in violation of

57. *Id.* at 774.

58. "[The] compelling interests identified in today's opinion suggest that the Constitution might in fact permit New York to ban knowing distribution of works depicting minors engaged in explicit sexual conduct, regardless of the social value of the depictions." *Id.* (citation omitted).

59. R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2543 (1992) (quotations omitted) (alteration in original).

60. *Id.* at 2544-45.

> an ordinance against outdoor fires could be punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag is not.[61]

This distinction with respect to flag-burning came from the decision in *United States v. O'Brien*,[62] where the Court found that incidental restrictions on protected speech may be constitutional if they are content-neutral.[63] The *O'Brien* Court identified four factors that must be met for a restriction to qualify as content-neutral.[64] The *O'Brien* test, however, has only been used for cases involving high speech traditionally considered worthy of constitutional protection.[65] The *O'Brien* Court did not extend this analysis to regulations on unprotected speech.

In a 1989 case, *Texas v. Johnson*,[66] the Court struck down a statute proscribing flag burning as an unjustified, content-based restriction on expressive conduct.[67] Although the majority did not find that the proscribed activity fell within the class of fighting words,[68] the dissent would have so found.[69] Justice Rehnquist noted in his dissent that:

> As with fighting words, so with flag burning, for the purposes of the First Amendment: It is no essential part of any exposition of ideas, and [is] of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the public interest in avoiding a probable breech of the peace.[70]

In reaching this conclusion, however, the *Johnson* dissent did not undertake or even hint at the analysis that was later applied in *R.A.V.* in determining whether restrictions on fighting words are valid.[71]

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61. *Id.* at 2544 (citing Barnes v. Glenn Theatre, Inc., 111 S. Ct. 2456 (1991); United States v. O'Brien, 391 U.S. 367 (1968)).

62. 391 U.S. 367 (1968).

63. *Id.* at 376-77.

64. *Id.* at 377 ("[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.").

65. *Id.* at 376.

66. 491 U.S. 397 (1989).

67. *Id.* at 400 n.1.

68. *Id.* at 409.

69. *Id.* at 430-32 (Rehnquist, C.J., dissenting).

70. *Id.* at 431 (alterations in original).

71. *See id.* at 421-35.

C. Recent First Amendment Cases Are At Odds with the Majority's Conclusion

In addition to the lack of support under traditional First Amendment cases, there has been no indication in the most recent cases that content-based restrictions violate free speech principles when applied to expression that falls outside of traditional First Amendment protection. In *Burson v. Freeman*,[72] the Court reviewed a Tennessee law that prohibited campaigning or campaign materials within 100 feet of a polling place on election day. The Court held that, while campaigning was protected political speech under the First Amendment, the free speech right could be limited in these circumstances when weighed against the competing fundamental rights inherent in the voting process. The Court noted that the statute was underinclusive because it only restricted political speech. The Court "agree[d] that distinguishing among types of speech requires that the statute be subjected to strict scrutiny."[73] The Court, however, found that the underinclusiveness of the statute was not fatal because there was no evidence that the unregulated speech led to the same harms as political speech. While the Court in *Burson* did acknowledge that underinclusiveness can give rise to strict scrutiny, it did so in the context of speech protected under fundamental First Amendment principles, and did not purport to extend strict scrutiny to fighting words.

The Supreme Court again examined a First Amendment challenge in *Simon & Schuster v. New York Crime Victims Board*.[74] In this case the Supreme Court struck down New York's "Son of Sam" law which placed all proceeds from books written by criminals into an escrow account to be held for five years for payment of civil suits brought by victims of that criminal. The Court held that this law acted as a disincentive to create or publish works of a particular content. Thus, "[i]n order to justify such differential treatment, 'the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.'"[75] The Court scrutinized the State's interest in assuring that criminals do not profit from their crimes. In addition to finding the statue overbroad,[76] the Court held that since the State only compensated victims out of the criminal's speech related assets while not placing similar burdens on other

72. 112 S. Ct. 1846 (1992).
73. *Id.* at 1855.
74. 112 S. Ct. 501 (1991).
75. *Id.* at 509.
76. *Id.* at 511.

assets the law was not narrowly tailored to meet its compelling interest.[77] While this analysis also presupposes an underinclusiveness doctrine, once again it only applied to fully protected speech.

Furthermore, Justice Kennedy, in his concurrence in *Simon & Schuster v. New York Crime Victims Board*,[78] explicitly distinguished laws directed at fully protected speech and speech of lesser value. Kennedy stated that in this case "a law is directed to speech alone where the speech in question is not obscene, not defamatory, not words tantamount to an act otherwise criminal, not an impairment of some other constitutional right, not an incitement to imminent lawless action, and not calculated or likely to bring about imminent harm the State has the substantive power to prevent."[79] He further noted "that the foregoing types of expression are . . . without First Amendment protection, as evidenced by the proscription of some visual depictions of sexual conduct by children . . . ."[80]

Of course, neither *Burson* nor *Simon & Schuster* addressed regulation of fighting words or low speech and, therefore, the Court in those cases did not speak directly to the questions raised in *R.A.V.* However, the Court did not even hint at the new interpretation of First Amendment precedent used in *R.A.V.*, and instead impliedly reaffirmed the approach that the *R.A.V.* majority later rejected.[81]

Instead of following established precedent, the majority in *R.A.V.* simply ventured out into a new area of First Amendment protection of its own creation. Furthermore, it did so without the aid of sufficient briefing, on this new doctrine, by the parties involved.[82]

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77. *Id.* at 510-11.

78. *Id.* at 501.

79. *Id.* at 512 (Kennedy, J., concurring).

80. *Id.* at 514 (citation omitted).

81. *Id.*

82. *See* Brief for Petitioner, R.A.V. v. St. Paul, 112 S. Ct. 2538 (1992) (No. 90-7675); Brief for Respondent, R.A.V. v. St. Paul, 112 S. Ct. 2538 (1992) (No. 90-7675); Reply Brief for Petitioner, R.A.V. v. St. Paul, 112 S. Ct. 2538 (1992) (No. 90-7675). One amicus brief did address the issue of a content-discrimination limitation. *See* Brief of Center for Individual Rights as Amicus Curiae in Support of Petitioner at 10-17, R.A.V. v. St. Paul, 112 S. Ct. 2538 (1992) (No. 90-7675). The amicus brief cited four Supreme Court cases and one Seventh Circuit Court case in support of a content discrimination limitation. *Id.* Each of the Supreme Court cases cited, however, involved content-based restrictions on *non-proscribable* speech. *See* Arkansas Writers' Project, Inc., v. Ragland, 481 U.S. 221 (1987); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Papish v. Board of Curators, 410 U.S. 667 (1973); Cox v. Louisiana, 379 U.S. 536 (1965). The Seventh Circuit case was decided on other grounds but, in dicta, did indicate support for a content discrimination limitation. Kucharek v. Hanaway, 902 F.2d 513 (7th Cir. 1990) (dictum), *cert. denied*, 111 S. Ct. 713 (1991). While the majority in *R.A.V.* disputed Justice White's assertion that the issue of content-discrimination limitation was not "fairly included" within the questions

III. The Majority's "Common Sense" Analysis Defies Common Sense

Lacking clear precedent for its new theory, the majority claimed that "common sense" dictated the protection of fighting words against viewpoint-based restrictions.[83] The majority used the example of a city council enacting "an ordinance prohibiting only those legally obscene works that contain criticism of the city government or, indeed, that do not include endorsement of the city government"[84] as demonstrating the need for limitations on content-based restriction of proscribable speech.

On first blush, this example may seem to support the majority's theory. As Justice White noted in his concurring opinion, however, "the Equal Protection Clause requires that the regulation of unprotected speech be rationally related to a legitimate government interest."[85] The courts never give absolute deference to the legislature in reviewing laws that draw distinctions such as the one in the majority's example. Such a distinction between unprotected political obscenity and unprotected apolitical obscenity would probably not pass rational basis review due to the difficulty in justifying legislation which incorporates this distinction. The "fantastical"[86] nature of such a law indicates that it is unlikely to arise, let alone pass review.

If such a law was passed, however, and was rationally based, why should it not become law? Inherent in the determination that speech constitutes fighting words or obscenity is the determination that the governmental interest in restricting the speech outweighs the slight value the speech may have. If the government has a rational basis for singling out a subset of that activity, then why should that subset be any more deserving of protection than the whole? The Court has determined that obscenity and fighting words are such ineffectual means of communication that the First Amendment does not shield them from regulation based on a legitimate government interest. Why then should a subset of fighting words suddenly receive strict scrutiny because it is being rationally restricted due to content? If this subset of speech effectively conveyed a political or other socially-redeeming

presented in the petition for certiorari, it did not dispute that the petitioner did not present the "novel theory the majority adopt[ed]." *R.A.V.*, 112 S. Ct. at 2542-43 n.3 (1992); *Id.* at 2550-51 n.1 (White, J., concurring).

83. *R.A.V.*, 112 S. Ct. at 2543.

84. *Id.*

85. *Id.* at 2555 (White, J., concurring).

86. *Id.* at 2562 (Stevens, J., concurring).

message, then it would by definition not fall within the unprotected class.

Similarly, Justice Scalia's comparison of low speech to the regulation of sound trucks does not support the majority's new test.[87] The majority asserts that "[a]s with the sound truck, however, so also with fighting words: The government may not regulate use based on hostility—or favoritism—towards the underlying message expressed."[88] This analogy assumes the sound truck is expressing a valid underlying message. Unlike sound trucks, however, fighting words have so little communicative value that the minimal underlying message does not reach the level of First Amendment protection[89] and is outweighed by the governmental interest in preventing harm.

IV. Exceptions to the New Doctrine

The majority did place some limits on its new doctrine, noting that "[e]ven the prohibition against content discrimination that . . . the First Amendment requires is not absolute. It applies differently in the context of proscribable speech than in the area of fully protected speech."[90] The majority carved out three exceptions to its main holding: restrictions on a subclass of speech the basis of which is the very reason the general class of speech is proscribable, restrictions on a subclass of speech associated with "secondary effects," and a catch-all, "other bases" exception.

A. Restrictions on a Subclass of Speech the Basis of Which is the Very Reason the General Class of Speech is Proscribable

The majority explained its first exception as follows:

> When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists. Such a reason, having been adjudged neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within the class.[91]

87. *Id.* at 2545. *See, e.g.*, Saia v. New York, 334 U.S. 558 (1948) (noting that a municipality could control the abusive use of a loudspeaker provided the statute enacted was narrowly drawn).

88. *R.A.V.*, 112 S. Ct. at 2545.

89. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

90. *R.A.V.*, 112 S. Ct. at 2545.

91. *Id.* at 2545-46.

The rationale for this exception was that speech may vary to the extent that it reflects those characteristics, such as lasciviousness for obscenity, that make a class of speech proscribable.[92] Because these characteristics are justifiably proscribed for their harmful nature, the legislature should be free to regulate to a greater extent that speech which most pronouncedly reflects such characteristics.

The majority used several examples to illustrate this point. First, it noted that a "[s]tate might choose to prohibit only that obscenity which is the most patently offensive in its prurience—i.e., that which involves the most lascivious displays of sexual activity. But it may not prohibit, for example, only that obscenity which includes offensive political messages."[93] The Court analogized that

> the Federal Government can criminalize only those threats of violence that are directed against the President, . . . since the reasons why threats of violence are outside the First Amendment (protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur) have special force when applied to the person of the President. . . . But the Federal Government may not criminalize only those threats against the President that mention his policy on aid to inner cities.[94]

The majority supported this exception to its newly crafted rule solely by example, without offering any precedent for its justification. Fortunately for the lower courts, with this exception the Court salvaged much First Amendment doctrine that would otherwise be unconstitutional under the new rule.[95] In fact, the concurring opinions suggest that this exception was an ad hoc creation, designed solely to provide this result.[96]

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92. *Id.* at 2546.

93. *Id.*

94. *Id.* (citations omitted).

95. Several decisions by the Supreme Court have upheld content-based restrictions on proscribable speech. *See, e.g.*, Watts v. United States, 394 U.S. 705 (1969) (upholding a statute that only criminalizes threats of violence directed against the President); *see generally* Burson v. Freeman, 112 S. Ct. 1846 (1992) (upholding a statute that prohibited campaigning or campaign materials within 100 feet of a polling place on election day).

96. Justice White stated, "The Court has patched up its argument with an apparently nonexhaustive list of ad hoc exceptions, in what can be viewed either as an attempt to confine the effects of its decision to the facts of this case . . . , or as an effort to anticipate some of the questions that will arise from its radical revision of First Amendment law." *R.A.V.*, 112 S. Ct. at 2556 (White, J., concurring). Justice Stevens noted that "[p]erhaps because the Court recognizes these perversities, it quickly offers some ad hoc limitations on its newly extended prohibition on content-based regulations." *Id.* at 2565 (Stevens, J., concurring).

Regardless of the purpose behind the creation of this exception, the real question is whether it provides a principled basis for distinguishing between constitutional and unconstitutional content-based restrictions on low speech. Justice Stevens took aim at the second of the majority's examples in his concurrence.[97] He argued that even assuming that "Congress may choose from the set of unprotected speech (all threats) to proscribe only a subset (threats against the President) because those threats are particularly likely to cause 'fear of violence,' 'disruption,' and actual 'violence,'"[98] this reasoning would still allow St. Paul to enact the *R.A.V.* ordinance without violating the Constitution. Justice Stevens argued that St. Paul's City Council should be given the same deference when it determined that the subclass of unprotected speech it proscribed generates the kinds of problems that are the very reason the general class of speech is proscribed.[99] He noted that "[j]ust as Congress may determine that threats against the President entail more severe consequences than other threats, so St. Paul's City Council may determine that threats based on the target's race, religion, or gender cause more severe harm to both the target and to society than other threats."[100] Justice Stevens concluded that the judgment "that harms caused by racial, religious, and gender-based invective are qualitatively different from that [sic] caused by other fighting words—seem[ed] to [him] eminently reasonable and realistic."[101] Indeed, it is not clear why threats based on a target's race cannot be found to embody, to a significantly greater extent than plain threats, the very reason that threats are proscribable under the First Amendment.

The majority identified the rationale for proscribing threats as "protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur."[102] The majority, however, did not thoroughly analyze these factors. The majority is correct that fear for the President's life would create a substantial public disruption. The possibility that the threatened violence against the President will occur, however, is most likely very small. Because Presidents are generally deemed to be responsible for the country's policies, it would not be surprising if they received death threats over the course of their tenure in office.

97. *Id.* at 2565 (Stevens, J., concurring).
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.* at 2546.

Due to lack of conviction and extraordinarily tight security, however, such threats are rarely acted upon. The low probability of the successful completion of the threatened action necessarily reduces the level of public fear of violence. Members of the general public are probably more afraid of threats of violence against themselves because of the high crime rates in our society. Arguably, race-based threats create an even greater fear because of the history surrounding such threats.[103]

In its example, the majority differentiated between criminalizing threats against the President and threats against the President mentioning administration policy on aid to the inner cities.[104] There may be circumstances, however, where it is legitimate for Congress to determine that threats pertaining to urban policy have "special force"[105] with respect to the reason threats against the President are proscribable. For example, our society faces growing unrest in the inner cities, as the riots in response to the Rodney King verdict in 1992 illustrate.[106] Due to the current dissatisfaction in the inner cities and the potential for social unrest resulting from perceptions of aid policies for urban areas, threats against the President based on such policies may in fact create an even greater fear of violence, a greater disruption engendered by that fear, and a greater possibility that the threatened violence will occur than for ordinary threats against the President.[107] Under these circumstances, it might appear that threats based on the President's aid policy to the inner cities "consist[ ] entirely of the very reason the entire class of speech at issue is proscribable."[108] Yet the majority dismissed such a regulation out of hand without considering the possibility that Congress could have a justification that is entirely consistent with the majority's rationale for the exception.[109]

The majority treated the application of this exception to the St. Paul ordinance in the same cursory fashion, stating that the ordinance "assuredly does not fall within the exception for content discrimination based on the very reasons why the particular class of speech at

103. *See* Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2365-66 (1989).

104. *R.A.V.*, 112 S. Ct. at 2546.

105. *Id.*

106. *See L.A. Readies Kids For New King Verdict*, S.F. EXAMINER, Feb. 21, 1993, at B5.

107. *R.A.V.*, 112 S. Ct. at 2546.

108. *Id.* at 2545.

109. *Id.*

issue (here, fighting words) is proscribable."[110] The majority's conclusion ignored the possibility that the St. Paul City Council may have determined that the class of fighting words proscribed by this ordinance[111] is inherently more threatening than other classes of fighting words.[112]

Interestingly, in the 1992-1993 Term following the *R.A.V.* decision, the Court unanimously acknowledged the special impact of bias-motivated acts. *Wisconsin v. Mitchell*,[113] a decision written by Chief Justice Rehnquist, upheld a Wisconsin statute that enhanced penalties where the underlying crimes were bias-motivated. The Court ruled that,

> the Wisconsin statute singles out for enhancement bias-inspired conduct because this conduct is thought to inflict greater individual and societal harm. For example, according to the State . . . bias motivated crimes are more likely to provoke retaliatory crimes, *inflict distinct emotional harms on their victims, and incite community unrest.* . . . The State's desire to redress these perceived harms provides an adequate explanation for its penalty-enhancement provision over and above mere disagreement with offenders' beliefs or biases. As Blackstone said long ago, "it is but reasonable that among crimes of different natures those should be most severely punished, which are the most destructive of the public safety and happiness."[114]

The justifications for the Wisconsin ordinance, which the Court accepted in *Mitchell*, apply with equal force to the proposition in *R.A.V.*; that bias-motivated fighting words are substantially more harmful than ordinary fighting words and therefore warrant special treatment.

The majority in *R.A.V.*, however, ignored the logic they would later embrace for sentence enhancements and dismissed these arguments. Justice Scalia noted that St. Paul "proscribed fighting words of whatever manner that communicate messages of racial, gender, or religious intolerance. Selectivity of this sort creates the possibility that the city seeks to handicap the expression of particular ideas. That possibility would alone be enough to render the ordinance presump-

110. *Id.* at 2548.

111. *See supra* note 4 and accompanying text.

112. The Minnesota Supreme Court, in upholding the constitutionality of St. Paul's ordinance, noted that "[t]here are certain symbols and regalia that in the context of history carry a clear message of racial supremacy, hatred, persecution, and degradation of certain groups." *In re* R.A.V., 464 N.W.2d 507, 508 (Minn. 1991) (quoting Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2365-66 (1989)).

113. 113 S. Ct. 2194 (1993).

114. *Id.* at 2201 (emphasis added) (citations omitted).

tively invalid . . . ."[115] The majority rested this conclusion on its belief that St. Paul banned an idea as opposed to a "mode" of expression.[116] The majority did not adequately explain why the use of race-based, religion-based, or gender-based fighting words could not be considered a mode of inflicting a specific type of harm with "special force"[117] in the context of fighting words.

Justice Scalia did respond by arguing that "[w]hat makes the anger, fear, sense of dishonor, etc. produced by violation of this ordinance distinct from the anger, fear, sense of dishonor, etc., produced by other fighting words is nothing other than the fact that it is caused by a distinctive idea, conveyed by a distinctive message."[118] The same is true, however, for threats directed at the President; they are merely distinctive ideas conveyed by distinctive messages. What sets these threats apart is that Congress determined that as a class they have special force. Similarly, what sets race-based, gender-based, or religious-based fighting words apart is that they too have special force. As Justice White noted,

> A prohibition on fighting words is not a time, place, or manner restriction; it is a ban on a class of speech that conveys an overriding message of personal injury and imminent violence . . . , a message that is at its ugliest when directed against groups that have long been the targets of discrimination. Accordingly, the ordinance falls within the first exception to the majority's theory.[119]

B. The Secondary Effects and Catch-All Exceptions

The majority created two other exceptions to its newly articulated doctrine: an extended secondary effects doctrine, and a catch-all exception. Through the secondary effects exception, the majority simply extended the secondary effects doctrine, enunciated in *Renton v. Playtime Theatres, Inc.*[120] and *Barnes v. Glen Theatre*,[121] so that it applied to proscribable speech as well as protected speech.[122] The majority's expansion of this doctrine is a natural corollary to its expansion of the doctrine prohibiting content-based regulation to the area of proscribable speech.

115. R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2549 (1992).
116. *Id.* at 2548-49.
117. *Id.* at 2548.
118. *Id.*
119. *Id.* at 2557 (White, J., concurring).
120. 475 U.S. 41, 48 (1986).
121. 111 S. Ct. 2456, 2469 (1991) (Souter, J., concurring).
122. *See supra* text accompanying notes 21-24.

The catch-all exception is more unusual and potentially problematic. In creating this exception, Justice Scalia noted:

> There may be other such bases [for exceptions] as well. Indeed, to validate such selectivity (where totally proscribable speech is at issue) it may not even be necessary to identify any particular "neutral" basis, so long as the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot.[123]

The majority conceded that it could not, for example, "think of any First Amendment interest that would stand in the way of a State's prohibiting only those obscene motion pictures with blue-eyed actresses."[124] This, however, put the majority in the awkward position of implying that entirely arbitrary restrictions on proscribable speech are allowable under the First Amendment, while restrictions aimed at preventing specific and substantial harms are constitutionally suspect. By creating this distinction, the majority impliedly acknowledged that fighting words are unprotected by the First Amendment because they can be arbitrarily limited. The only time these words acquire First Amendment protection is when the state limits them for content-based reasons. Thus, the subclass of racial, religious, or gender-based fighting words gain special protected status[125] due to the state's motives in proscribing them. This is a backward approach to First Amendment protection of speech. There must be protectible content in the speech itself to merit consideration under the First Amendment, irrespective of how the state treats such speech. If a particular class of speech can be arbitrarily restricted without violating the First Amendment, how can the very same speech suddenly gain protection against non-arbitrary restrictions?

The First Amendment protection must exist prior to state action to be implicated after state action. The lack of any rational basis requirement indicates that the protection does not exist prior to restriction, and thus the speech should be entirely proscribable, regardless of the state's rationale, be it content-based or not. What is even more surprising about this dual standard for proscribable speech, is that when the state's restrictions are content-based, the majority would apply strict scrutiny, providing fighting words with a level of protection equivalent to the *most protected* political speech.[126]

123. *R.A.V.*, 112 S. Ct. at 2547.

124. *Id.*

125. By "protected status" I am referring to the protection from content-based restrictions such fighting words are given under the majority's opinion.

126. Justice White argued,

In his concurrence, Justice Stevens noted that many of the Court's past cases "involved the selective regulation of speech based on content—precisely the sort of regulation the Court invalidates today. Such selective regulations are unavoidably content-based, but they are not, in my opinion, 'presumptively invalid.'"[127] He further pointed out that:

> The Court states that the prohibition on content-based regulations "applies differently in the context of proscribable speech than in the context of other speech," . . . but its analysis belies that claim. The Court strikes down the St. Paul ordinance because it regulates fighting words based on subject matter, despite the fact that . . . we have long upheld regulations of commercial speech based on subject matter. The Court's self-description is inapt: By prohibiting the regulation of fighting words based on its [sic] subject matter, the Court provides the same protection to fighting words as is currently provided to core political speech.[128]

The majority may have created the three exceptions to its new approach to content-based restrictions on proscribable speech in order to salvage prior decisions in this area of First Amendment law. These exceptions did not, however, cure the infirmities in this new doctrine, and created as many problems as they resolved in determining when speech restrictions are valid.[129]

V. Effects of the New Doctrine

In light of this new doctrine for content-based restrictions on proscribable speech, we are left with the question: What will be its impact on First Amendment jurisprudence? The doctrine will have its most immediate effect in three areas: hate-speech ordinances, commercial speech, and Title VII challenges.

> Justice Scalia concurred in the judgment in *Burson* [*v. Freeman*], reasoning that the statute, "though content-based, is constitutional [as] a reasonable, viewpoint-neutral regulation of a nonpublic forum." . . . However, nothing in his reasoning in the present case suggests that a content-based ban on fighting words would be constitutional were that ban limited to nonpublic fora. Taken together, the two opinions suggest that, in some settings, political speech, to which "the First Amendment 'has its fullest and most urgent application,'" is entitled to less constitutional protection than fighting words.

R.A.V., 112 S. Ct. at 2555 n.8 (White, J., concurring) (citations omitted).

127. *Id.* at 2564 (Stevens, J., concurring). *See also* Calvin R. Massey, *Hate Speech, Cultural Diversity, and the Foundational Paradigms of Free Expression*, 40 UCLA L. REV. 103 (1992).

128. *R.A.V.*, 112 S. Ct. at 2564 n.4 (Stevens, J., concurring).

129. *See* Schimmel, *supra* note 1.

A. Implications for Hate-Speech Ordinances

The new content-neutrality requirement will effectively eliminate the ability of a state to create a narrowly tailored ordinance aimed specifically at the harms of racial, religious, or gender-based fighting words that would otherwise pass constitutional muster. The majority has made it clear that they view the harms of such fighting words to be simply the direct result of the message conveyed and of the same class of insult as "aspersions upon a person's mother."[130] The majority has left available only one option for proscribing such fighting words, and that is a statute that prohibits all fighting words regardless of content, such as a general assault statute. Unfortunately, this approach allows no recognition by the state of the special harm inherent in a particular subclass of fighting words, no matter how painful, odious or destructive.

Furthermore, these limitations will also most likely curtail campus speech codes designed to eliminate an atmosphere of racial hostility in the educational setting. Because public colleges are usually held to be state actors with respect to speech restrictions, campus hate-speech codes similar to the St. Paul ordinance would also be unconstitutional.[131]

In addition, there is likely to be confusion in lower courts trying to interpret the three exceptions to the majority's doctrine. The majority gave no insight as to how to define what is "the very reason [an] entire class of speech at issue is proscribable."[132] The divisions in the *R.A.V.* decision as to how to apply this exception foreshadow confusion in interpretation by the lower courts. Furthermore, the majority's third, catch-all exception provides no guidance in distinguishing between official suppression and arbitrary restrictions. The majority suggested only that "so long as the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot,"[133] a content-based restriction is constitutional.

The Court has left one additional avenue open for punishing hate speech. *Wisconsin v. Mitchell*[134] held that sentence enhancements determined by whether the defendant selected a victim based on the victim's race or gender did not violate the defendant's First Amendment

130. *R.A.V.*, 112 S. Ct. at 2548.
131. *See generally* Schimmel, *supra* note 1.
132. *R.A.V.*, 112 S. Ct. at 2545.
133. *Id.* at 2547.
134. 113 S. Ct. 2194, 2202 (1993).

rights.[135] Of course, such penalty enhancements require that the defendant first commit an assault or other crime in order for the state to address the underlying motivations. These enhancements cannot be used to attack hate speech alone, even when such speech may constitute fighting words.[136]

B. Implications for Commercial Speech

It is unlikely that the new principles established in *R.A.V.* will have any impact on commercial speech regulation. Instead, the doctrinal approaches to these areas of proscribable speech will most likely continue to diverge, undermining any possibility for articulating a unified approach to proscribable speech.

Both commercial speech and fighting words are considered to be proscribable speech, not meriting the highest level of protection under the First Amendment. As such, the courts should treat these areas analogously. However, it is unlikely that the *R.A.V.* approach will be incorporated into commercial speech principles. In recent commercial speech cases, the Court gave great deference to legislatures imposing content-based regulations on commercial speech.[137] In *R.A.V.*, however, the majority did not give deference to the City Council in fashioning content-based restrictions on fighting words. Justice Stevens noted in his concurrence to *R.A.V.* that:

> the Court recognizes that a State may regulate advertising in one industry but not another because the "risk of fraud (one of the characteristics that justifies depriving [commercial speech]

135. The Wisconsin penalty enhancement provision increases the maximum penalty for a crime whenever a defendant "[i]ntentionally selects the person against whom the crime . . . is committed or selects the property which is damaged or otherwise affected by the crime . . . because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property. . . ." *Id.* at 2197 n.1.

136. Although the constitutionality of such sentence enhancements was upheld by the Court, there are obvious parallels between this issue and the hate speech ordinance struck down in *R.A.V.* A critical analysis of the Court's reasoning in *Mitchell* and the distinctions it draws from *R.A.V.*, however, are beyond the scope of this Note. *See generally* Stephen R. Martin II, Note, *Establishing the Constitutional Use of Bias-Inspired Beliefs and Expressions in Penalty Enhancement for Hate Crimes: Wisconsin v. Mitchell*, 27 CREIGHTON L. REV. 503 (1994); Brian Resler, Note, *Hate Crimes—New Limits on the Scope of First Amendment Protection?*, 77 MARQ. L. REV. 415 (1994).

137. *See, e.g.*, Board of Trustees v. Fox, 492 U.S. 469 (1989) (requiring only a reasonable fit between regulation and state interest); Posadas de P.R. Assoc. v. Tourism Co. of P.R., 478 U.S. 328 (1986) (upholding a ban on local advertising when the advertised activity could be banned by the state; and giving greater deference to the legislature in determining the best approach); *see also* Albert P. Mauro, Comment, *Commercial Speech After Posadas and Fox: A Rational Basis Wolf in Intermediate Sheep's Clothing*, 66 TUL. L. REV. 1931 (1992).

> of full First Amendment protection . . .)" in the regulated industry is "greater" than in other industries. . . . Again, the same reasoning demonstrates the constitutionality of St. Paul's ordinance. "[O]ne of the characteristics that justifies" the constitutional status of fighting words is that such words "by their very utterance inflict injury or tend to incite an immediate breach of the peace." . . . Certainly, a legislature that may determine that the risk of fraud is greater in the legal trade than in the medical trade may determine that the risk of injury or breach of the peace created by race-based threats is greater than that created by other threats.[138]

The majority in *R.A.V.*, however, did not follow a course parallel to commercial speech doctrine. It is also unlikely that the Court will diverge from the recent developments in commercial speech regulations.[139] Thus, it appears that we will continue to see diverging approaches to analogous areas of First Amendment law with the Court continuing to rely on ad hoc exceptions, such as those in *R.A.V.*, to justify its conclusions.

C. Impact on Title VII Actions

The third area likely to be directly affected by the ruling in *R.A.V.* is Title VII[140] actions for sexual and racial harassment in the workplace. The new fighting words doctrine potentially renders current Title VII doctrine unconstitutional.

1. Title VII Doctrine

Courts have generally found two forms of workplace harassment to violate Title VII: "quid pro quo" and "creation of a hostile work environment."[141] In quid pro quo harassment, an employee is confronted with submitting to sexual advances in order to receive benefits or promotion, or simply to avoid being fired.[142] For the second form of harassment, an employee is forced to endure a hostile work environment because "the workplace is so 'polluted' with sexual hostility toward women—or racial hostility to other races—that it discrimina-

138. R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2565 (1992) (Stevens, J., concurring).

139. *See* Mauro, *supra* note 137; Bruce P. Keller, *Recent Developments in the Law of Advertising and Commercial Speech*, C790 A.L.I. 47 (1992).

140. Civil Rights Act of 1964, 42 U.S.C. § 2000e (1991). *See also* 18 U.S.C. § 242 (1991); 42 U.S.C. §§ 1981, 1982 (1991); 29 C.F.R. § 1604.11 (1991).

141. *See* Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481, 484-85 (1991).

142. *Id.* at 485.

torily alters the 'terms and conditions of employment' within the meaning of the statute."[143]

A federal court first recognized the hostile work environment violation of Title VII in *Rogers v. EEOC*,[144] where the Fifth Circuit held that an

> [e]mployee's psychological as well as economic fringes are statutorily entitled to protection from employer abuse, and . . . the phrase "terms, conditions, or privileges of employment" in Section 703 is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination.[145]

The Equal Employment Opportunity Commission (EEOC) adopted a set of guidelines[146] for enforcing Title VII based on the expansive approach of *Rogers*, which the Supreme Court later endorsed in *Meritor Savings Bank v. Vinson*.[147] The Court noted that "[i]n concluding that so-called 'hostile environment' (i.e., non *quid pro quo*) harassment violates Title VII, the EEOC drew upon a substantial body of judicial decisions and EEOC precedent holding that Title VII affords employees the right to work in an environment *free from discriminatory intimidation, ridicule, and insult*."[148] In its guidelines, the EEOC defines sexual harassment as "verbal or physical *conduct* of a sexual nature [that] has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment."[149] Although the guidelines are ostensibly targeted at verbal conduct, "courts have consistently interpreted [this] to mean 'verbal expression.'"[150] Indeed, Title VII violations usually stem directly from a person's expressed beliefs of racial or gender superiority, and the actions brought are aimed at suppressing

143. *Id.* This Comment only focuses on the implications of *R.A.V.* for the latter form of harassment.

144. 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 857 (1972).

145. *Id.* at 238.

146. 29 C.F.R. § 1604.11 (1991).

147. 477 U.S. 57 (1986). Interestingly, this opinion, supporting expansive protection from discriminatory ridicule and insult in the workplace, was written by then-Justice Rehnquist. *Id.*

148. *Id.* at 65 (emphasis added).

149. 29 C.F.R. § 1604.11(a)(3) (1991) (emphasis added).

150. Browne, *supra* note 141, at 482 (citing Rabidue v. Osceola Ref. Co., 584 F. Supp. 419, 432 (E.D. Mich. 1984) (noting that the term "'verbal conduct of a sexual nature' . . . seems to be directed toward profane words and pictures that deal with sex"), *aff'd*, 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987) (footnotes omitted)). *See also* Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1798-1800 (1992).

those viewpoints.[151] In *Davis v. Monsanto Chemical Co.*,[152] the Sixth Circuit articulated that Title VII requires employers to prevent employees from expressing offensive viewpoints, holding that

> while Title VII does not require an employer to fire all "Archie Bunkers" in its employ, the law does require that an employer take prompt action to prevent such bigots from expressing their opinions in a way that abuses or offends their coworkers. By informing people that the expression of racist or sexist attitudes in public is unacceptable, people may eventually learn that such views are undesirable in private, as well. Thus, Title VII may advance the goal of eliminating prejudices and biases in our society.[153]

This description of hostile-environment regulation demonstrates that Title VII regulates expression on the basis of viewpoint.[154]

2. *Title VII After* R.A.V.

Under the general rule established by the *R.A.V.* majority—that viewpoint-discriminatory statutes are unconstitutional even as applied to proscribable speech—Title VII would be rendered unconstitutional because it prohibits the expression of offensive viewpoints in the workplace. The majority in *R.A.V.*, however, went to great lengths to distinguish Title VII from invalid content-based speech restrictions such as the St. Paul ordinance. The majority noted that:

> since words can in some circumstances violate laws directed not against speech but against conduct . . . , a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech. Thus, for example, sexually derogatory fighting words, among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices. Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.[155]

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151. Browne, *supra* note 141, at 483.

152. 858 F.2d 345 (6th Cir. 1988), *cert. denied*, 490 U.S. 1110 (1989).

153. *Id.* at 350.

154. *See* Jules B. Gerard, *The First Amendment in a Hostile Environment: A Primer on Free Speech and Sexual Harassment*, 68 NOTRE DAME L. REV. 1003, 1004 (1993) ("That [the federal hostile-environment laws] discriminate on the basis of viewpoint . . . is not in doubt. The government's interest in the hostile-environment cases is entirely one of suppressing offensive or disagreeable ideas—'the right to work in an environment free from . . . ridicule, and insult.'").

155. R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2546-47 (1992) (quotations omitted) (citations omitted); *see also* Wisconsin v. Mitchell, 113 S. Ct. 2194, 2200 (1993) (noting that

Thus, the majority dismissed any application of its holding in *R.A.V.* to Title VII cases, arguing that Title VII is directed at conduct and not speech. The majority also argued that restrictions on proscribable speech under Title VII are constitutional under the secondary effects exception to its content discrimination doctrine.[156] This conception of Title VII doctrine, however, is incorrect.

In many Title VII cases, the offensive nature of an employee's expressed viewpoint, as well as its impact on the victim, are important elements in establishing a hostile work environment. For example, in *EEOC v. Murphy Motor Freight Lines, Inc.*,[157] the court held that racial slurs repeatedly written on chalkboards and the construction of a wooden cross near where the plaintiff worked contributed to the creation of a hostile work environment.[158] The slurs at issue in *Murphy Motor Freight Lines*, such as, "The only good nigger is a dead nigger," and, "Send all blacks back to Africa,"[159] were crude expressions of racial superiority, similar to the burning cross used by Robert Viktora, yet they were found to have helped create illegal racial harassment in the workplace. Alternately, in *Goluszek v. Smith*, the court rejected the claim by a male plaintiff that his coworkers sexually harassed him with their lewd comments concerning the plaintiff's sex life.[160] The *Goluszek* court held that harassment occurs where "the offender is saying by words or actions that the victim is inferior because of the victim's sex," which is not the case when the harassed as well as the harassers are male.[161] This holding illustrates that the effect of the expression on the class of victims is an important factor in finding a violation of Title VII, as was also the case for the St. Paul ordinance.[162]

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in *R.A.V.* the Court found Title VII to be permissible content-neutral regulation of conduct).

156. *See supra* notes 22-61 and accompanying text.

157. 488 F. Supp. 381 (D. Minn. 1980).

158. *Id.* at 384-86. *See also* Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991) (holding for the first time that coworkers' displays of sexually-oriented pictures and use of sexual remarks that did not constitute propositions could create a hostile work environment even without any other abusive conduct).

159. *Murphy Motor Freight Lines, Inc.*, 488 F. Supp. at 384.

160. 697 F. Supp. 1452, 1454-56 (N.D. Ill. 1988).

161. *Id.* at 1456.

162. *See also* Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991) ("Conduct that many men consider unobjectionable may offend many women."); Andrews v. City of Philadelphia, 895 F.2d 1469, 1486 (3d Cir. 1990) (noting that although men might find obscenity and pornography in the workplace harmless, women might find it highly offensive, thereby creating a hostile work environment); Williams v. Atchison, T. & S.F. Ry., 627 F. Supp. 752, 755-56 n.2 (W.D. Mo. 1986) ("[I]t seems impermissible to exempt [railroad workers] from rules forbidding racial insults. Railroad workers doubtless know how to speak and

Thus, despite what the *R.A.V.* majority claims, in Title VII actions the government is arguably targeting conduct in part on the basis of its expressive content,[163] and not because of the "secondary effects" of the speech. As Professor Browne noted,

> Unlike the ordinance in *Renton*, which sought to regulate adult movie theaters without reference to any "viewpoint" that might be expressed in the films, sexual harassment regulations prohibit speech primarily on the basis of the viewpoint expressed. An employee's work performance may be seriously affected by his coworkers' telling him he is the illegitimate offspring of a diseased prostitute, but he is entitled to no protection. An employee may be similarly offended by continual expression of feminist viewpoints in the workplace. Such employees, however, are without recourse under Title VII.[164]

Title VII, therefore, should not fall within the majority's secondary effects exception to its new doctrine.

Justice White, in his concurring opinion, suggested that one reason for the expansive secondary effects exception in *R.A.V.* was to salvage the constitutionality of Title VII. He noted that "there is a simple explanation for the Court's eagerness to craft an exception to its new First Amendment rule: Under the general rule the Court applies in this case, Title VII hostile work environment claims would suddenly be unconstitutional."[165] Justice White pointed out that Title VII regulation is similar to the St. Paul ordinance "because it 'impose[s] special prohibitions on those speakers who express views on disfavored subjects."[166] Justice White then rebutted the majority's assertion that because Title VII is aimed at proscribable conduct, the secondary effects exception insulates it from constitutional challenge. He correctly noted that

> the hostile work environment regulation is not keyed to the presence of an economic quid pro quo, but to the impact of the speech on the victimized worker. Consequently, the regulation would no more fall within a secondary effects exception than does the St. Paul ordinance. Second, the majority's focus on the statute's general prohibition on discrimination glosses over the language of the specific regulation governing hostile working

behave in 'mixed company.' They must realize that under Title VII railroad workers *are* a 'mixed company.'").

163. Browne, *supra* note 141, at 483 ("[P]rotected expression is often a substantial, if not the primary, basis for imposing liability.") (footnote omitted).

164. *Id.* at 522 (citations omitted).

165. R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2557 (1992) (White, J., concurring).

166. *Id.* (quoting Justice Scalia's majority opinion at page 2547).

environment, which reaches beyond any "incidental" effect on speech.[167]

The majority's validation of government regulation targeted at conduct but not based on the expressive content of that conduct ignored the fact that elements of Title VII are aimed at the expressive content of conduct and even speech. Verbal harassment in the workplace that creates a work environment that is hostile to certain groups violates Title VII regulations precisely because of its communicative impact on the listener.[168] Because Title VII has been interpreted to be directed specifically at racial, ethnic, religious or sexual discrimination, it should be subject to the same infirmities that made the St. Paul ordinance unconstitutional. Clearly, the majority was stretching its characterization of Title VII to avoid finding it unconstitutional under the new doctrine. Although the majority did assert that Title VII was still constitutional in dicta, it is not clear that this assertion can survive a direct challenge under the new viewpoint-discrimination doctrine. After *R.A.V.*, if a defendant challenges the broad definition of a hostile work environment laid out under Title VII,[169] the courts will be faced with either invalidating Title VII or relying on the arbitrary and incorrect inclusion of Title VII in the secondary effects exception to the *R.A.V.* doctrine. Unfortunately, the future of Title VII protection against workplace harassment after the *R.A.V.* decision has been thrown into considerable doubt.

Conclusion

R.A.V. v. City of St. Paul is a radical departure from traditional First Amendment precedent in its new content-discrimination prohibition for fighting words. Justice Scalia's opinion provides little guidance in the application of the new general rule or the exceptions to the rule, and the rationales it offers are logically troublesome and inconsistent. As a result, the holding throws the current case law on Title VII into doubt.

In June of 1992, when Robert A. Viktora burned a cross on the front yard of an African American's home, he intended to convey a message of hate. Little did he realize that his act would precipitate a radical alteration in the landscape of First Amendment protection of

167. *Id.* (citations omitted).

168. *See* Volokh, *supra* note 150 (noting that just because Title VII does not explicitly mention speech it is not immunized from First Amendment scrutiny).

169. Defined as an environment that is not "free from discriminatory intimidation, ridicule, and insult." Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 65 (1991) (endorsing the EEOC guidelines on hostile work environment).

proscribable speech. Unfortunately, we will not know the full effects of his act until this new doctrine has been played out in the First Amendment decisions to come.